Bellcore

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Michael S. Slomin
Senior Counsel

MCC 1A-152R
445 South Street
Morristown, NJ 07960-6438
201 829-2355 Fax 201-829-2365
Email: mike2@cc.bellcore.com

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Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D. C. 20554

Re: Ex Parte Submission on behalf of
Corning, Incorporated in GC Docket No. 96-42

Corning's *ex parte* filing of April 17 with the Commission purports to set forth a "compromise" proposal. However, this filing is not the result of any compromise with Bellcore. The filing is flatly inconsistent with a number of positions advanced by Bellcore in this proceeding (*e.g.*, funding, flexibility, voting). It raises new issues not previously addressed in comments (*e.g.*, treatment of intellectual property rights), and represents an unauthorized additional round of comments that should not be considered herein, and certainly not at this late date given the time constraints of the proceeding. Nevertheless, since Corning has moved towards Bellcore's positions on certain issues, Bellcore will respond to the Corning letter. We emphasize, however, that in the details there are still significant problems in what Corning still proposes, and as to which Bellcore cannot agree.

1. Corning has moved closer to Bellcore's proposal for tri-partite mediation as the Commission's prescribed "default" dispute resolution process, although Nortel's Reply presents a much more balanced compromise proposal by another supplier. Unlike Corning's latest proposal, Nortel's approach incorporates the notion that the majority of funding parties should be allowed, in the first instance, to choose among a number of options for dispute resolution, and that rejection or modification of the result of dispute resolution by the funding parties should track a proposed ANSI procedure for "consensus" decisions, *i.e.*, a majority of the total membership (or funders), and 2/3 of those members (or funders) voting excluding abstentions.

2. Bellcore stands by its reply comments addressing "funding." Parties do not fund Bellcore's development of generic requirements by providing comments or other in-kind contribution (assuming that a specific value could be placed on a given contribution); they do so by providing dollars. It is those dollars that defray the costs of developing generic requirements. We strongly disagree with Corning's suggestion that bearing a fair share of these costs is in some manner a barrier to participation in the activities of the non-accredited standards development organization. Corning's interpretation of the term "funding" has no basis in the statutory language, nor in ordinary and customary usage. Indeed, accredited standards bodies charge participation fees and membership fees that are not discounted by in-kind contributions. The statute uses the terms "fund" and "funding" separate from "participate"

and "submit comments." As Bellcore stated in its Reply, the opportunity to "fund and participate" in the relevant activity of the non-accredited standards organization is available to all interested parties, but a party must be willing to help fund the activity before it has the right to otherwise participate, submit comments for publication, or invoke the dispute resolution procedure in connection with that activity.

In the case of an organization such as Bellcore, which has a professional staff in place with the responsibility for producing the final technical outputs, funding a given output means paying an aliquot portion of the costs of its development by the staff charged with this responsibility. Indeed, the Commission has recently recognized the value to interoperability of Bellcore's leadership in standards. Chairman's speech to the Network Reliability Comforum, April 18, 1996. We continue to believe that a failure by each participant to bear its aliquot portion of the development costs would be inconsistent with the legislative requirement that funding proceed on a reasonable and non-discriminatory basis. A vendor's self-interested comments or contributions will be considered on their merits, but they are not in lieu of funding.

The funding provisions of Section 273(d)(4)(A) were intended to provide the industry an opportunity to fund and participate broadly in an open process. They were not intended to tell a non-accredited standards development organization that it cannot have its own professional staff to conduct its work, and charge all funding parties accordingly to recover the costs of such work. This is in no way unfair to a vendor, which can choose whether or not to share in the funding of a particular generic requirement or standard in which it is interested – and not other unrelated generic requirements or standards. Non-discriminatory funding means that funding by parties participating in the relevant non-accredited standards development project should be computed on the same basis when they are receiving like services. It does not mean giving some parties a "free ride" while saddling other parties with costs that they should not be bearing alone. Finally, funding vendors not only have the opportunity to participate in and help influence the content of the generic requirements relating to their products, they also have the opportunity to do so directly with their potential customers – a very direct and tangible benefit.

3. The unfairness inherent in Corning's treatment of "funding" would be compounded by its proposal that costs associated with alternate dispute resolution be incorporated in the costs of producing the generic requirement – costs that, under Corning's interpretation of a "funding party," some parties would not bear. Such a party could create colorable technical disputes at will to delay the generic requirements process, at no cost to it whatsoever.

4. While we are gratified that Corning has seen the benefit of a process that results in some cases – but by no means all, see #7 below – in an actual decision rather than a non-decision, their adoption of only one of the options advanced by Bellcore, and not others, is too inflexible. We see merit in having tri-partite mediation available as one of the options, and we suggested that it be the fallback to be used in the event of a deadlock. However, we and other parties herein continue to believe that some disputes might better be resolved if addressed through escalation, decision of the funding parties, or reference to another expert body (such as a standards body).

5. Corning's proposed voting procedures are unworkable. So long as a single funding party has any direct or indirect equity interest (or the equivalent thereof) in a non-accredited standards development organization – or any ownership interest in intellectual property that might be advantaged by the final resolution of the dispute –the funding parties could reject the mediation panel's recommendation only by unanimous vote (excluding the disputing party and the non-accredited standards development organization). Although funding parties' direct or indirect interests in the non-accredited standards development organization would affect the result, a supplier's direct or indirect interest in one or more funding parties would not. A supplier's affiliate, or another serving as its proxy, could veto the decision of all participating carriers under the Corning approach. Furthermore, there is no exception for even a *de minimus* interest well short of any control, and the new provisions on intellectual property advantages are unnecessary and could prove unworkable, see #10 below.

6. The super-majority that Corning would impose in all other cases, three-quarters, is somewhat better than unanimity but not much so. We would note in this regard that even the Constitution reserves a three-quarter super-majority for only the gravest of issues, with the vast majority of decisions made by majority vote, and only a few by two-thirds vote. While Bellcore continues to believe that majority voting is appropriate here, we note that Nortel has proposed a reasonable compromise in connection with a very limited use of the more stringent 2/3 majority of funding parties actually voting for ratification or rejection after escalation, or for action on the result of mediation. Nortel would retain majority voting for selection of the dispute resolution forum.

7. Corning's proposal that the funding parties may choose among only five listed possibilities, should they decide not to accept the mediators' recommendation, would improperly limit their options as funders. Indeed, to do so would give a binding effect to the results of the process which is inconsistent with the nature of a mediation recommendation. In this regard, it should be recalled that there has been virtually unanimous opposition in this proceeding to a binding arbitration approach.

8. One of the options to be available to the mediators is a decision that the issue is not ready for a decision. Since the disputed generic requirement would have proposed a resolution of that issue, this would be a decision to table the issue, under a description different than Corning's earlier one. Stated alternatively, this is another non-decision alternative.

9. Corning's proposal would require the mediation panel to effectively decide *de novo* and within the statutory timeline what is "the most technically sound solution," rather than the more customary appellate standard of whether there is a reasonable technical basis for the generic requirement being disputed by a funding party. Bellcore agrees with Corning that the mediation panel should base its recommendation upon the "substantive evidence presented to the mediators" (although this should be limited to technical evidence), but their examination should be directed at whether the proposals of the non-accredited standards development organization (1) can be reasonably supported by technical evidence that would be credible to technical experts, and (2) do not ignore any contrary credible technical evidence proffered by the disputing funding party. Under this approach, the panel would not get into the business of

becoming a standards body itself, and could complete its review timely.

10. At the same time, Corning proposes that an additional new decisional standard govern the mediators' decision: commercial viability. We are not certain what Corning means by this, since Corning does not explain it, but it could go well beyond the "technical" matters contemplated by Section 273(d)(5). Are the mediators to engage in economic analysis? cost analysis? market projections? analysis of manufacturability? If information relevant to the foregoing would reveal competitively sensitive business information – information that no standards body would ordinarily accept for legal reasons – it would be difficult or impossible for the mediators to obtain it. Furthermore, consideration of such issues might not have even been part of the generic requirements that are being disputed. We submit that new matter such as this will not be addressed in the fifteen days Corning proposes to be available, and this will lead inevitably to the "not ready for a decision" non-decision as the only result that could be reached in time.

11. Intellectual property would improperly be brought into the process in two ways. First, as part of dispute resolution a party submitting information would have to disclose whether it has intellectual property that would be advantaged or disadvantaged by the decision (and the panel would have to consider this), and second, if a funding party has intellectual property that would be advantaged by final resolution of the dispute, a unanimous decision would be required to reject the mediation recommendation. Corning does not define intellectual property, although it would appear to encompass patents, copyrights and trade secrets. Nor does it limit these to the corporation or department in which a given participant might work. The participants may well not know of the existence of some intellectual property (especially in the case of trade secrets which, necessarily, are held closely). Determining what intellectual property is involved in a given dispute, and whether it would be "advantaged" (whatever that means) could be extremely burdensome.

    ANSI-accredited standards development organizations encourage early disclosure of intellectual property rights, but do not require it. Possession of intellectual property rights does not affect the ability of a participant to make submissions or to vote. Requiring disclosure of intellectual property rights would inhibit funding and participation in the activities of the non-accredited standards organization, just as ANSI and others have argued that doing so will inhibit participation in accredited standards organization activities.*

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* The dispute resolution time frames are very short, less than thirty days. Patent searches are costly and time consuming even for disputants, not to mention other funders who would not be motivated to incur such a cost, and could therefore not be completed in that time period. The U.S. government, with broad support from the U.S. private sector, objected strongly to a European proposal in the European Telecommunications Standards Institute (ETSI) that would have required early disclosure of intellectual property rights as part of their process. This trade issue was finally resolved only when ETSI rescinded their earlier proposal and adopted procedures consistent with those of ANSI, the International Telecommunications Union (ITU) and the International Standards Organisation (ISO/IEC). Finally, we emphasize that this proposal would affect entities other than Bellcore, some of which have hundreds of

In sum, Corning's latest proposals involve a measure of compromise, but still have the essential undesirable features of Corning's comments: inflexibility, unworkability, inadequate recognition of funding parties' needs, and failure to resolve issues. They advance a wholly unwarranted construction of "funding," and then compound its unfairness by loading the costs of dispute resolution on others. They introduce new matters (intellectual property, commercial viability) that are not addressed in the statute or in previous comments. If they are not intended to create delay, they will certainly have that effect. And, the voting procedures they propose (unanimity, 3/4) are far more stringent than what is legitimately needed to protect minority concerns while properly recognizing the interests of all funding parties. We urge the Commission to adopt Bellcore's proposals.

Respectfully submitted,

Michael S. Slomin
Senior Counsel

Joseph A. Klein
Vice President & Assistant General Counsel

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members. Corning's proposal could call into question submissions of such an organization to a dispute resolution panel if even one member failed to report one intellectual property right.

CERTIFICATE OF SERVICE

I, Monica P. Roach-Williams, certify that this nineteenth day of April, 1996, I mailed, First Class mail postage prepaid, copies of the foregoing letter in response to *ex parte* filing of Corning, Incorporated in GC Docket No. 96-42 to the following:

William F. Caton, Acting Secretary*
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Reed E. Hundt, Chairman*
Federal Communications Commission
1919 M Street, N. W., Room 814
Washington, D. C. 20554

James H. Quello, Commissioner*
Federal Communications Commission
1919 M Street, N. W., Room 802
Washington, D. C. 20554

Rachelle B. Chong, Commissioner*
Federal Communications Commission
1919 M Street, N. W., Room 844
Washington, D. C. 20554

Susan Ness, Commissioner*
Federal Communications Commission
1919 M Street, N. W., Room 832
Washington, D. C. 20554

Regina Keeney, Chief*
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N. W., Room 500
Washington, D. C. 20554

William E. Kennard, General Counsel*
Federal Communications Commission
1919 M Street, N. W., Room 614
Washington, D. C. 20554

(* Copies delivered by hand)
Sheldon M. Guttman*
Associate General Counsel, Administration Law
Federal Communications Commission
1919 M Street, N. W., Room 616
Washington, D. C. 20554

Sharon B. Kelley, Esq.*
Office of General Counsel
Federal Communications Commission
1919 M Street, N. W., Room 619
Washington, D. C. 20554

Philip L. Verveer
John L. McGrew
(Counsel for Corning, Incorporated)
Willkie Farr & Gallagher
1155 21st Street, N. W., Suite 600
Washington, D. C. 20036-3384

Thomas W. Cohen
(Counsel for Telecommunications
Industry Assocation)
Davison, Cohen & Company
1701 K Street, N. W., Suite 800
Washington, D. C. 20006

William B. Barfield
Michael J. Schwarz
BELLSOUTH CORPORATION
1155 Peachtreet Street, N.E., Suite 1800
Atlanta, Georgia 30309-3610

Lawrence W. Katz
Bell Atlantic Telephone Companies
1320 N. Court House Road, 8th Floor
Arlington, Virginia 22201

Robert B. McKenna
US WEST, INC.
1020 19th Street, N.W., Suite 700
Washington, D. C. 20036

Alan N Baker
Ameritech
2000 West Ameritech Center Drive
Room 4H64
Hoffman Estates, Illinois 60196

Paul Walters
SBC Communications Inc.
One Bell Center, Room 3520
St. Louis, Missouri 63101

Susan Miller
Alliance for Telecommunications
Industry Solutions
1200 G Street, N.W.
Room 222
Washington, D. C 20005

Glenn E. Moore
SpecTran Corporation
Sturbridge, Mass. 01566

Loretta J. Garcia
MCI TELECOMMUNICATIONS CORP.
1801 Pennsylvania Avenue, N.W
Washington, D. C. 20006

Frances Schrotter
American National Standards Institute
11 West 42 Street
New York, New York 100036

Stephen L. Goodman
Counsel for Northern Telecom Inc.
Halprin, Temple, Goodman & Sugrue
1100 New York Avenue, N.W
Suite 650, East Tower
Washington, D. C. 20005

Lucille M. Mates
140 New Montgomery Street, Rm. 1526
San Franciso, California 94105

Monica P. Roach-Williams